



FINDINGS OF FACT

After reviewing the evidentiary record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

Claimant worked for respondent in concrete construction for approximately 12 years. He sustained personal injury to his hands and wrists caused by repetitive trauma arising out of and in the course of his employment for respondent. Due to worsening symptoms, claimant sought medical treatment with his primary care physician, Dr. Douglas Anderson, on March 13, 2013. Dr. Anderson did not take claimant off work, nor did he impose restrictions. He ordered an EMG and referred claimant to Dr. Wojciech Przylecki, a hand specialist.

Claimant was evaluated by Dr. Przylecki on April 17, 2013. Dr. Przylecki advised claimant that the problems with his hands and wrists were caused by his work. Claimant did not know his condition was work related until Dr. Przylecki told him. On April 18, 2013, claimant provided respondent with notice of his work related injuries.

Claimant's wrists were treated surgically. He remains on restricted duty. He has not worked since he was taken off on April 30, 2013.

Claimant had experienced problems with tingling and numbness in his upper extremities for approximately five to six years. His symptoms gradually worsened as he continued to perform his job, which required the use vibrating power tools such as jack hammers and drills. Claimant testified:

Q. At that point in time when you went to see Doctor Anderson on March 13th, did you have the belief that your work, meaning the use of the [jack hammers] and so on and so forth, was causing or aggravating your problems with your hands?

A. I didn't know at that time.

. . . .

Q. And what I'm getting at is before you went in to see Doctor Anderson, were you concerned that the use of [jack hammers] and the other things you're required to do at your work were causing these problems with your hands?

A. I didn't know what was causing. I mean, that's why I went to the doctor to find out.

Q. When you had the meeting with Doctor Anderson on the 13th, did you discuss with him the kinds of things you do at work?

A. Yeah.

Q. And did you tell him that you do heavy-duty physical labor with [jack hammers] and --

A. I told him I did concrete work.

Q. Did he tell you [that] could be a cause of what your problems are?

A. He really didn't say anything. He just made an appointment. He said we'll send you to get an EMG. He didn't know what -- know more than I did, I don't think.

Q. Did he at least mention that work may be a problem for you?

A. He didn't even mention anything.<sup>1</sup>

#### **PRINCIPLES OF LAW**

K.S.A. 2012 Supp. 44-501b states in part:

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2012 Supp. 44-508 provides in part:

(e) "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

In the case of injury by repetitive trauma, the date of injury shall be the earliest of:

(1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;

(2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;

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<sup>1</sup> P.H. Trans. at 14-15.

(3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or

(4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.

In no case shall the date of accident be later than the last date worked.

(h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2012 Supp. 44-520 provides:

(a)(1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:

(A) 30 calendar days from the date of accident or the date of injury by repetitive trauma;

(B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or

(C) if the employee no longer works for the employer against whom benefits are being sought, 20 calendar days after the employee's last day of actual work for the employer.

Notice may be given orally or in writing.

(2) Where notice is provided orally, if the employer has designated an individual or department to whom notice must be given and such designation has been communicated in writing to the employee, notice to any other individual or department shall be insufficient under this section. If the employer has not designated an individual or department to whom notice must be given, notice must be provided to a supervisor or manager.

(3) Where notice is provided in writing, notice must be sent to a supervisor or manager at the employee's principal location of employment. The burden shall be on the employee to prove that such notice was actually received by the employer.

(4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.

(b) The notice required by subsection (a) shall be waived if the employee proves that (1) the employer or the employer's duly authorized agent had actual knowledge of the injury; (2) the employer or the employer's duly authorized agent was unavailable to receive such notice within the applicable period as provided in paragraph (1) of subsection (a); or (3) the employee was physically unable to give such notice.

(c) For the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included.

### ANALYSIS

The undersigned Board Member finds the ALJ correctly determined claimant's date of injury by repetitive trauma was April 17, 2013, pursuant to K.S.A. 2012 Supp. 44-508(e)(3), and that claimant provided respondent with timely notice of his injury within 20 calendar days following the date claimant sought medical treatment for his injury by repetitive trauma, pursuant to K.S.A. 2012 Supp. 44-520(a)(1)(B).

Whether notice is timely depends on the date of injury by repetitive trauma, which is a legal fiction.<sup>2</sup> Claimant was required to provide notice within 20 days from seeking medical treatment for his injury by repetitive trauma or 30 days from the date of injury by repetitive trauma, whichever came first. The Appeals Board has interpreted the 20-day notice requirement as 20 days from the date claimant first sought medical treatment for the injury by repetitive trauma after the date the injury by repetitive trauma has been established under K.S.A. 2012 Supp. 44-508(e).<sup>3</sup>

The date of claimant's injury by repetitive trauma pursuant to the "triggering events" set forth in K.S.A. 2012 Supp. 44-508(e), was the date claimant was advised by a physician, Dr. Przylecki, on April 17, 2013, that his condition was work related. Claimant provided respondent with notice the following day, April 18, 2013, well within the 20-day period allowed by K.S.A. 2012 Supp. 44-520(a)(1)(B).

Since claimant's visit with Dr. Anderson on March 13, 2013, occurred before the date of claimant's injury by repetitive trauma, the date claimant sought medical treatment for the injury by repetitive trauma could not have occurred until, at the earliest, April 17, 2013.

### CONCLUSION

This Board Member finds:

1. The date of claimant's injury by repetitive trauma was April 17, 2013.
2. Respondent was provided with timely notice of the injury.

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<sup>2</sup> See *Saylor v. Westar Energy, Inc.*, 292 Kan. 610, 615, 256 P.3d 828 (2011); *Curry v. Durham D & M, LLC*, No. 1,051,135, 2011 WL 1747854 (Kan. WCAB Apr. 27, 2011).

<sup>3</sup> See *Bujanda v. Certainteed Corp.*, No. 1,060,558, 2012 WL 6101130 (Kan. WCAB Nov. 30, 2012); *Shields v. Mid Continental Restoration*, No. 1,059,870, 2012 WL 4763702 (Kan. WCAB Sep. 19, 2012); *Walker v. General Motors, LLC*, No. 1,059,354, 2012 WL 2061788 (Kan. WCAB May 30, 2012); *Vergara v. Perfekta, Inc.*, No. 1,059,159, 2012 WL 2061786 (Kan. WCAB May 18, 2012).

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>4</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.<sup>5</sup>

**WHEREFORE**, the undersigned Board Member finds that the August 9, 2013, preliminary hearing Order entered by ALJ Brad Avery is affirmed.

**IT IS SO ORDERED.**

Dated this 28th day of October, 2013.

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HONORABLE GARY R. TERRILL  
BOARD MEMBER

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Hon. Brad Avery, Administrative Law Judge

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<sup>4</sup> K.S.A. 2012 Supp. 44-534a.

<sup>5</sup> K.S.A. 2012 Supp. 44-555c(k).